Supreme Court, U.S.
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No. —

IN THE

Supreme Court of the United States

OCTOBER TERM 1996

BIC CORPORATION,

Petitioner,

v.

ROBERT CARNEY and SHEILA CARNEY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a district court's order remanding a case to state court for lack of subject matter jurisdiction is reviewable on appeal when the jurisdictional determination rests on a decision that implicates the federal Constitution.

PARTIES TO THE PROCEEDINGS

Petitioner BIC Corporation was appellant below before the United States Court of Appeals for the Eighth Circuit and petitioner on its petition for rehearing in that court. Respondents Robert Carney and Sheila Carney were appellees. There are no petitioners or respondents in addition to those named in the caption.

Petitioner notes that its parent is Societe BIC, S.A. BIC Corporation owns a majority interest in Industrial de Cuautitlan, S.A. de C.V. and No Sabe Fallar, S.A. de C.V. Aside from those interests, BIC Corporation has no non-wholly owned subsidiaries.

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PETITION FOR CERTIORARI

BIC Corporation ("BIC") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit as described herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit that gives rise to this petition (App. 1a) is published at 88 F.3d 629 (8th Cir. 1996). The district court's order remanding this case to state court (App. 8a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit dismissing BIC's appeal from the district court's remand order was entered on July 8, 1996.[1] BIC filed a petition for rehearing and rehearing en banc, and on August 7, 1996, the Court of Appeals denied this petition. App. 12a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution provides:

> This Constitution, and the laws of the United Sates which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State

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[1] In response to the district court's remand order, BIC simultaneously filed a petition for mandamus and an appeal in the Eighth Circuit. The Eighth Circuit summarily denied BIC's petition for mandamus on November 2, 1995, App. 13a, but then received briefs, heard oral argument, and issued a written opinion on the appeal. Under these circumstances, where the petition for mandamus and the appeal raised the same issues, a petition for certiorari from both decisions is timely filed within ninety days of the Court of Appeals' decision on the appeal, whether mandamus or appeal is the proper avenue for appellate court review. *See Mercer v. Theriot*, 377 U.S. 152, 153 (1964).

shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, clause 2.

The federal removal statute provides in part:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a).

The removal statute also provides:

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447(d).

The Missouri statute involved provides in pertinent part:

537.762. Motion to dismiss, defendant whose only liability is as seller in stream of commerce, requirements, procedure — order of dismissal to be interlocutory.

1. A defendant whose liability is based solely on his status as a seller in the stream of commerce may be dismissed from a products liability claim as provided in this section.

* * *

6. No order of dismissal under this section shall operate to divest a court of venue or jurisdiction otherwise proper at the time the action was commenced. A defendant dismissed pursuant to this section shall be considered to remain a party to such action only for such purposes.

Rev. Stat. Mo. § 537.762 (1987) (full text at App. 14a).

STATEMENT OF THE CASE

Petitioner BIC was sued by respondents Robert Carney and Sheila Carney in the Circuit Court for the City of St. Louis on July 28, 1994. Respondents alleged products liability with respect to a butane lighter manufactured by BIC, and they also named as a defendant the local retailer who allegedly sold the lighter, Clifford Massie d/b/a Massie One Stop. BIC is a New York corporation with its principal place of business in Connecticut. Respondents and Massie were residents of Missouri.

In the state court, respondents and Massie agreed to a stipulation dismissing Massie from the case. App. 11a. BIC did not participate in that agreement. The stipulation stated that "Defendant Clifford Massie, d/b/a Massie One Stop . . . shall remain a party to this action only for the purposes of venue and jurisdiction as provided in R.S.Mo. 537.762(6) (1987)." No order of dismissal was ever entered.

Based on the stipulated dismissal of Massie, BIC removed this case to the United States District Court for the Eastern District of Missouri on March 3, 1995. In its removal papers, BIC pointed out that the dismissal of the non-diverse retailer created diversity jurisdiction between the remaining parties, respondents and BIC. On March 9, 1995, respondents moved to remand, arguing that Massie remained in the case for purposes of jurisdiction under the Missouri statute and the stipulation.

In opposition to respondents' motion to remand, BIC argued, *inter alia*, that the construction of the Missouri statute sought by respondents would be constitutionally invalid because it would allow a state statute to destroy federal subject matter jurisdiction. In an Order filed July 14, 1995 (App. 10a), the district court granted respondents' motion to remand. The district court ruled that Massie remained a party to the litigation for purposes of jurisdiction because of Rev. Stat. Mo. § 537.762 and stated, without explanation or citation of authority, "[t]he Court is not persuaded by BIC's contention that § 537.762.6 is an

impermissible attempt by state law to defeat removal jurisdiction[.]" App. 9a.

On appeal to the Eighth Circuit, BIC argued, *inter alia*, that the district court's remand order was reviewable under the rule set forth in *Waco v. U.S. Fidelity & Guaranty Co*, 293 U.S. 140 (1934) because the order was based on a decision on the merits of a collateral issue, *i.e.*, the effect of the Missouri statute.[2] BIC also argued that the district court's (erroneous) interpretation of the Missouri statute, which allowed respondents and Massie to stipulate away federal subject matter jurisdiction, made the statute "an impermissible attempt to oust federal jurisdiction," and thus unconstitutional under the Supremacy Clause (citing, *e.g.*, *Railway Co. v. Whitton's Administrator*, 80 U.S. (13 Wall.) 270 (1872)).

The Eighth Circuit dismissed BIC's appeal for lack of jurisdiction under 28 U.S.C. § 1447(d). The Eighth Circuit rejected BIC's argument derived from *Waco* on the ground that the district court's ruling was not separable from its jurisdictional determination but rather was "necessary to determine whether such jurisdiction existed." App. 6a (quotation omitted). The Eighth Circuit acknowledged BIC's argument that "the [Missouri] statute is invalid to the extent that it limits diversity jurisdiction," App. 4a., but considered this argument as going to "the merits," which it refused to address.

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[2] On this issue, BIC argued that the Missouri statute did not apply to this case because (1) the statute by its terms requires a court order to effect its peculiar partial dismissal of a retailer defendant, but no order was ever entered by the state court, and (2) the language and legislative history of the statute make clear that it was intended only to address a matter of procedure in the Missouri courts, and was not intended to affect federal court jurisdiction. For purposes of this petition, however, the district court's construction of the Missouri statute is controlling and the proper interpretation of the statute is not at issue.

REASONS FOR GRANTING THE PETITION

The reviewability of remand decisions is a constantly recurring and important issue in the federal courts. While 28 U.S.C. § 1447(d) appears on its face to bar review of all but a small category of remand orders, the decisions of this Court and the courts of appeals in fact allow review in a significant proportion of cases. This case presents a conflict in the federal courts of appeals over an exception to non-reviewability for remand orders where the remand turns on the determination of a federal constitutional issue. This case squarely presents the constitutional issue exception because the district court's interpretation of the Missouri statute violates the Supremacy Clause by allowing a state statute directly to destroy federal subject matter jurisdiction, and the Eighth Circuit held that it lacked appellate jurisdiction even though that constitutional issue was presented to it for review.

A. THE REVIEWABILITY OF DISTRICT COURT REMAND ORDERS IS A FREQUENTLY RECURRING ISSUE THAT IMPLICATES IMPORTANT FEDERAL INTERESTS

Whether district court remand decisions are reviewable on appeal is an issue that arises constantly in the federal system. A search of the Westlaw computer database shows that the federal district courts issued 84 published remand opinions (either in book form or on-line) in less than ten months in 1996 alone, and hundreds more undoubtedly took the form of conclusory orders that were never published. The right of defendants to remove a case to federal court where federal jurisdiction exists is an important federal right. The proper interpretation of 28 U.S.C. § 1447(d) thus is an important and frequently arising issue.

28 U.S.C. § 1447(d) purports to bar appellate review of virtually all district court remand orders. In practice, however, it is not unusual for remand orders to be reviewed by the courts of appeals. In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1975), this Court concluded that the bar to review imposed by § 1447(d) is limited to remands on the grounds stated in 28 U.S.C. § 1447(c), though on its face the statute contains no

statement to that effect. The remand in *Thermtron* was held reviewable because it was based on the district court's crowded docket, which is not a basis specified in § 1447(c).

Following *Thermtron*, remand orders appear clearly to be reviewable where they rest on a discretionary decision by the district court, since such orders do not involve the grounds stated in § 1447(c). *See, e.g., Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988) (holding that district courts have discretion to remand pendent state claims); *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996) (remand order based on district court's belief that it had discretion to remand state-law claims was reviewable); *PAS v. Travelers Insurance Co.*, 7 F.3d 349 (3d Cir. 1993) (remand based on district court's discretion to decline to exercise supplemental jurisdiction was reviewable); *McDermott International, Inc. v. Lloyd's Underwriters of London*, 944 F.2d 1199 (5th Cir. 1991) (discretionary remand order based on the parties' insurance contract was reviewable by appeal).

Jurisdiction to review remand orders on appeal also exists where remand turns on an antecedent ruling which is itself subject to review. *See Waco v. U.S. Fidelity & Guaranty Co*, 293 U.S. 140, 143 (1934) (dismissal of third-party defendant was reviewable on appeal where "in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause"); *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273, 277 (9th Cir. 1984) (reasoning from *Waco* that § 1447(d) does not apply, and remand orders are reviewable, if remand is mandated by a substantive decision on the merits apart from the jurisdictional determination, *e.g.*, a forum-selection agreement); *Carr v. American Red Cross*, 17 F.3d 671, 682-83 (3d Cir. 1994) ("where a separable and final determination has been made by the district court, whether substantive or jurisdictional, which determination triggers a remand, we will review both the underlying final order and the remand order itself").

While these rules of thumb appear to allow review of certain remand orders in a manner consistent with *Thermtron*, there are

also respects in which the federal courts have behaved inconsistently in determining the reviewability of remand orders. For example, the courts of appeals vary widely in their willingness to scrutinize remand decisions to determine if the remand actually was based on a lack of federal subject matter jurisdiction. *Compare, e.g., Richards v. Federated Dept. Stores, Inc.*, 812 F.2d 211, 211 (5th Cir.) (remand orders "which recite the magic words" of "improvidently and without jurisdiction" are not reviewable "at all") (per curiam), *cert. denied sub nom. Sanger-Harris v. Richards*, 484 U.S. 824 (1987) *with Mangold v. Analytic Services, Inc.*, 77 F.3d at 1450 (appellate court must "look past contextually ambiguous allusions and even specific *citations* to § 1447(c) to determine by independent review of the record the actual grounds or basis [of the remand]") (emphasis in original); *In re First National Bank of Boston*, 70 F.3d 1184, 1189 n.4 (11th Cir. 1995) (to defer to "magic words" "would establish a review standard that would preserve and perpetuate similar abuses of discretion by district courts and preclude our review").

B. THERE IS A CONFLICT IN THE CIRCUITS AND SUBSTANTIAL UNCERTAINTY IN THE LAW CONCERNING THE REVIEWABILITY OF REMAND ORDERS THAT TURN ON FEDERAL CONSTITUTIONAL ISSUES

Separate and apart from *Thermtron* and these exceptions to non-reviewability that follow from it, an exception to non-reviewability has been recognized where the remand decision itself turns on the resolution of a federal constitutional issue. This exception was first recognized in *In Re TMI Litigation Cases Consolidated II,* 940 F.2d 832 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992), where the district court remanded the case to state court after determining that it lacked federal subject matter jurisdiction. That determination, in turn, was based on the district court's "conclusion that the [Price-Anderson Amendments Act of 1988, 42 U.S.C. § 2011 *et seq.*] itself was unconstitutional[.]" *Id.* at 835. The Third Circuit reversed the consti-

tutional determination after concluding that it had jurisdiction to review the remand order:

> Such constitutional determinations could not have been intended by Congress to fall within the category of routine subject matter jurisdiction determinations contemplated by section 1447(c) and, consequently, are not immune from review under section 1447(d).

Id. at 848.

The constitutional issue exception has been acknowledged by other circuits as well. For example, in *Baldridge v. Kentucky-Ohio Transportation Inc.*, 983 F.2d 1341 (6th Cir. 1993), the Sixth Circuit accepted that the exception is based on the "entirely defensible view" that "Congress did not intend to vest the district courts with the authority to make final determinations regarding the constitutionality of federal statutes." *Id.* at 1345 (internal quotations omitted). *See also Krangel v. General Dynamics Corp*, 968 F.2d 914, 916 (9th Cir. 1992) (acknowledging the existence of the exception).

By contrast, in this case the Eighth Circuit squarely rejected BIC's argument that the district court's remand order was reviewable because the district court gave the Missouri statute a construction that violates the Supremacy Clause.[3] The Eighth Circuit treated BIC's argument as addressing "the merits" and held that it could not consider the issue because under 28 U.S.C.

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[3] Specifically, BIC argued to the district court, citing Supreme Court and numerous court of appeals' decisions based on the Supremacy Clause, that "[a]s interpreted by Plaintiffs' attorney, Section 537.762(6) and (7) operate to prevent or defeat the right of Defendant BIC to remove this case . . . . It has long been the [constitutional] rule that a state may not interfere with federal jurisdiction." BIC's Memorandum in Opposition to Plaintiffs' Motion to Remand at 3. Likewise, in the Eighth Circuit BIC argued that "[t]o the extent the Missouri venue statute is interpreted to oust federal jurisdiction, it is invalid." Appellant's Br. at 25 (citing, *e.g.*, *Railway Company v. Whitton's Administrator*, 80 U.S. (13 Wall.) 270 (1871) and *Goldey v. Morning News*, 156 U.S. 518, 523 (1895)).

§ 1447(d) it lacked jurisdiction to review the remand order. App. 4a. The Eighth Circuit thus rejected the constitutional issue exception as a basis for review of remand orders.

At present, there is genuine uncertainty in the federal courts as to whether remand orders resting on the decision of federal constitutional issues are subject to review by an appellate court. Not only the decision in this case, but a literal application of the *Thermtron* rule would suggest that no such review is available where, as in *TMI*, the resolution of the constitutional issue had the effect of defeating federal court jurisdiction. On the other hand, *Thermtron* did not involve, and did not specifically purport to address, a situation where the federal constitutional question is determinative of jurisdiction, and thus of the remand. And, as the Third Circuit recognized in *TMI*, there are very compelling reasons to uphold the reviewability of constitutionally-based remand decisions.[4]

Since the early days of the Republic, it has been clear that this Court is the ultimate interpreter of the provisions of the Constitution, and of the ways in which those provisions constrain the legislation and conduct of the federal and state governments. That can be no less true where a constitutional ruling is determinative of a remand decision, than where it leads to a broader resolution of the merits of a case. It cannot be the law that where a district court's invalidation of a federal or state statute comes in the course of a remand to state court, it is immunized from review by a higher court. To so conclude would disable the process by which this Court is able to bring coherence

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[4] See Hart and Wechsler, *The Federal Courts and the Federal System* 1667-68 & n.3 (4th ed. 1996) (asking rhetorically whether § 1447(d) could have been "drafted [in] clearer language," but also noting that "*Thermtron* has served as the basis for a number of appellate decisions permitting review of remand orders in situations that, at the least, raise difficult questions of interpretation under § 1447(d)," citing, *e.g.*, *TMI*).

and consistency to constitutional jurisprudence.[5] Yet, absent an exception from the non-reviewability rule for constitutionally-based remand decisions, that is precisely the result that follows from *Thermtron*. As the court stated in *TMI*:

> Because remand orders premised upon section 1447(c) are absolutely unreviewable, on appeal or otherwise, a district court's constitutional determination, if couched in terms of section 1447(c) and followed by a remand order, could *never* be reviewed.

940 F.2d at 845 (emphasis in original).[6]

The unacceptability of this conclusion is most obvious where a district court has in fact struck down a federal or state statute on federal constitutional grounds. The creation of such unreviewable precedents of legislative invalidation, with binding effect in the districts where decided and persuasive effect elsewhere, cannot be squared with basic notions of constitutional jurisprudence and

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[5] *See, e.g., Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816) ("if there were no revising authority to control these jarring and discordant judgments [of multiple state courts], and harmonize them into uniformity, the laws, the treaties and the constitution of the United States would be different, in different states . . . . The public mischiefs that would attend such a state of things would be truly deplorable[.]"); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365 (1953) (arguing that Article III of the Constitution prohibits Congress from making such exceptions to Supreme Court appellate jurisdiction "as will destroy the essential role of the Supreme Court in the constitutional plan"); Bator, *Withdrawing Jurisdiction from Federal Courts*, 7 Harv. J. L. & Pub. Pol'y 31, 32 (1984) (arguing that proposals to withdraw jurisdiction from the Supreme Court would strip the nation of the "authoritative law-giver" needed for a "viable society").

[6] Presumably, a conclusion that § 1447(d) applies to constitutionally-based remand orders, as to other orders, thus rendering them "not reviewable on appeal or otherwise," also would foreclose review by this Court.

separation of powers. Reviewability is likewise critical where, as here, the decision to remand rests on the rejection of federal constitutional arguments. This Court's authority to define and enforce the Constitution's guarantees must extend to remand orders, and that authority cannot be made to turn on whether those guarantees have been upheld or rejected by the court below.

C. THIS CASE SQUARELY PRESENTS THE QUESTION WHETHER REMANDS BASED ON THE DETERMINATION OF CONSTITUTIONAL ISSUES ARE SUBJECT TO APPELLATE REVIEW

In this case, the Eighth Circuit concluded that it lacked jurisdiction to review a district court remand decision even though that decision turned on resolution of BIC's constitutional challenge to a state statute as construed by the district court. The district court interpreted the Missouri statute so as to permit two of the parties to this case to stipulate away federal diversity jurisdiction. This decision was inconsistent with the federal removal statute, 28 U.S.C. § 1441, and a gross violation of the Supremacy Clause, and BIC presented that contention in unmistakable terms to the courts below.

It is too well-established to be disputed that state laws cannot directly interfere with federal jurisdiction, including federal jurisdiction on removal. As long ago as *Railway Company v. Whitton's Administrator*, 80 U.S. (13 Wall.) 270 (1872), removal was objected to on the ground that a Wisconsin statute dictated that wrongful death actions must be brought in state courts. This Court held that the forum-limitation clause of the state statute was ineffective, saying:

> In all cases, where a general right is thus conferred, it can be enforced in any Federal court within the state having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such federal court by any provision of state legislation that it shall only be enforced in a state court. . . . Whenever a general rule as to property or personal rights, or injuries to either, is established by state legislation, its enforcement by a federal court in a case between proper parties is a matter of

> course, and the jurisdiction of the court, in such case, is not subject to state limitation.

Id. at 286.

Many cases subsequent to *Whitton* have reiterated that state statutes cannot be permitted to interfere with federal removal jurisdiction. *See, e.g., Goldey v. Morning News,* 156 U.S. 518, 523 (1895) (federal jurisdiction "cannot be enlarged or abridged by any statute of a State. The legislature or the judiciary of a State can neither defeat the right given by a constitutional act of Congress to remove a case from a court of the State . . ., nor limit the effect of such removal."); *Terral v. Burke Const. Co.*, 257 U.S. 529, 532 (1922) ("the federal Constitution confers upon citizens of one State the right to resort to federal courts in another, [and] state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void" under the Supremacy Clause); *International Insurance Co. v. Duryee*, 96 F.3d 837, 838 (6th Cir. 1996) (Ohio statute that effectively prohibits out-of-state insurance companies from removing cases to federal court, by barring them from further business in Ohio if they attempt to remove, directly conflicts with the federal removal statute in violation of the Supremacy Clause).

While Rev. Stat. Mo. § 537.762 may be valid as an exercise of Missouri's authority over its own courts, the district court here interpreted the statute to authorize two of the parties to stipulate away federal diversity jurisdiction on removal. This construction of the Missouri statute makes it a direct interference with federal removal jurisdiction. If plaintiffs are permitted to destroy federal jurisdiction by the artifice of keeping phantom defendants in a case not for determining liability against them, but solely to destroy complete diversity in a manner analogous to fraudulent joinder, then the federal right of removal will be largely nullified. In this circumstance, an exception to the rule of non-reviewability of remand orders must exist in order to allow limited review of the constitutional issue presented.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari, raising the question whether the Eighth Circuit had jurisdiction to review a remand order that was based on the district court's determination of the constitutional question presented to it, should be granted.

Respectfully submitted,

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